# "Fast Food":

## The Next Tobacco?

*By Dwight J. Davis, Ann Driscoll and Jaime Schwartz**

In the Summer of 2002, three lawsuits were filed against Quick Service Restaurants ("QSRs") alleging that various classes of plaintiffs had suffered damages caused by eating what is commonly referred to as "fast food." Plaintiffs' counsel and the behind-the-scenes consumer advocates supporting him proclaimed that the fast food lawsuits arose from and would reflect many of the same tobacco litigation tactics that the tobacco plaintiff's bar has been trying to use against cigarette manufacturers.

> What we're trying to do is use some of the same legal tactics that have been so effective against the public health problem of smoking against the other public health problem of obesity.[1]

This paper will explore exactly what it means to employ "tobacco litigation tactics" and will survey the defenses that can be mounted against them. This paper concludes that the tobacco litigation tactics are destined for failure, not merely in the tobacco arena, but particularly in the QSR litigation. The nature of fast food is well understood by the consuming public, and it is factually and legally impossible to attribute liability for any particular individual's health to a QSR, as opposed to the choices, lifestyle and genetics of each individual. These simple and fundamental points can be expected to carry the day quickly in the QSR litigation.

This article begins with a brief history of tobacco litigation and an overview of the three complaints filed to date against QSRs. The article then offers a discussion and analysis of the application of plaintiffs' tobacco litigation tactics to the food industry and examines some of the key product attributes that should lead to the early dismissal of the fast food litigation.

### Tobacco Litigation and The Development of "Tobacco Litigation Tactics"

The term "tobacco litigation tactics" as used in this paper refers to various evolving tactics that anti-tobacco advocates and members of the plaintiffs' bar engaged in during the long history of both the regulation of cigarettes and the litigation over the effects of those products. As will be seen in the brief review of the history that follows, the key tactics appear to consist of (1) generating negative publicity that demonizes the product and the manufacturer; (2) attempting to make the product socially unacceptable and convincing the government to join that effort; (3) without regard to the fact that sales to minors are illegal and that the companies do not sell cigarettes at retail, focusing on the use or consumption of the product by children and teenagers; (4) focusing on the manufacturer's so-called "manipulation" of, and preoccupation with, certain components of the product (alleging manipulation of nicotine, for example); (5) focusing on how demand for the product is allegedly caused by overpowering and omnipresent advertising and asserting that the product has no independent social utility; and (6) pointing to documents that are alleged to conflict with public positions or that reveal facts or internal thought processes that the company did not share with the public, without regard to whether the documents contain any new facts or not.

### Brief History

It has been widely believed for more than 100 years that smoking presents health risks. It has also been part of common experience that smoking can be hard to quit. In the 1950s, scientists began publishing research showing statistically that most people who developed lung cancer had been smokers, and also showing that mouse skin painted with tobacco smoke condensate yielded excess skin tumors. These scientific reports were widely publicized, and the resulting publicity was characterized as a cancer scare, causing cigarettes to take a dip in popularity. This wave of negative publicity was followed by the first wave of tobacco litigation in the 1950s and 60s, as individuals who believed that smoking had caused them to develop a disease brought lawsuits against the company that manufactured the brand or brands they smoked. This first wave of litigation was unsuccessful for tobacco plaintiffs and their counsel as juries and courts rejected the claims because, for example, the medical proof failed or because the jury found that the smoker assumed the risk.

In 1964, the United States Surgeon General issued a landmark report on Smoking and Health and opined that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[2] The issuance of the report was a watershed event that galvanized many interests groups, politicians and public health scientists against cigarettes. Later, legislation was passed requiring the first health warning on cigarette packages ("Caution: Cigarette Smoking May Be Hazardous To Your Health")[3] The required content of this federal warning was amended over the years, and additional reports were issued each year by the Surgeon General addressing various issues affecting smoking and health. In addition to requiring warnings, the federal legislation ultimately resulted in a ban on television and radio advertising of tobacco products commencing in 1972, and also led to required tar and nicotine statements in print advertising. Meanwhile, anti-tobacco advocates continued to work on various strategies to make smoking socially unacceptable and to devise legal theories that might permit new attacks on tobacco companies in courtrooms around the country.

In the mid-1980s, in a so-called "second wave" of tobacco litigation, plaintiffs attempted to take advantage of the expanding law of product liability and tried to fashion claims

of fraud, concealment, failure to warn, strict liability, negligence and breach of warranty. The cases were still traditional individual lawsuits, brought on behalf of a single smoker against the companies that manufactured the brands smoked by the plaintiff. One of the pivotal issues addressed by the courts in the second wave was the extent to which the Federal Cigarette Labeling Act (which required package warnings) expressly preempted state law tort claims against cigarette manufacturers. In 1992, a sharply splintered United State Supreme Court issued its plurality opinion in *Cipollone v. Liggett Group,*[4] and determined that from the effective date of the Labeling Act in July 1969, failure to warn claims, concealment claims and claims attacking advertising as undermining the warnings were all preempted, but claims of express fraud and express warranty survived express federal preemption.

From 1954 to 1994, the tobacco company defendants successfully defended approximately 813 lawsuits. Plaintiffs lawyers and anti-tobacco advocates tried to develop new legal and factual theories to divert attention from the choices and decisions of individual smokers. Anti-tobacco advocates theorized that smoking rates would decrease if smoking could be made socially unacceptable. They also theorized that tobacco plaintiffs might be able to avoid continuous courtroom defeats if tobacco companies and their products could be demonized in the eyes of the public. Since the 1960s, the percentage of the adult population that smoked had fallen from a high in the 40% range down to the present day levels of roughly one-fourth of the adult population by the 1990s.[5] The anti-tobacco advocates endeavored to find a way to make smoking by 25% of the population extremely unpopular to the 75% of the population that did not smoke. The movement began with vocal non-smokers complaining that they did not like the smell of smoke. Soon, there were efforts to ban smoking in restaurants, first in California in the mid-1980s and then across the country. Smoking was banned on various airline routes commencing in 1986. Bans in public and private buildings followed, and soon there were images of smokers huddled in the cold outside buildings, ostracized to enjoy the pleasure of a cigarette. By the early 1990s the opposition to secondhand smoke took on the garb of science, with the EPA declaring that exposure to environmental tobacco smoke could cause lung cancer.[6]

In 1994, Congress held hearings on the dangers of cigarettes. The hearings and the surrounding media blitz often focused on privileged documents that had been taken from one of the tobacco companies by one of its outside paralegals, who first tried unsuccessfully to extort money from the company in exchange for the documents and then violated an injunction against him by disseminating the documents to members of the plaintiffs' bar who were renowned for their success in asbestos cases. Eventually, these lawyers and their allied forces succeeded in generating media stories that made it appear to be news that cigarettes presented health risks and could be hard to quit and that all of this had just been discovered in tobacco company documents.

At approximately the same time, the plaintiffs' bar explored new procedural and substantive legal approaches in an effort to find a recipe for success against the companies in the courtroom. In an effort to avoid the individual issues that had thus far spelled defeat, an army of plaintiffs' firms –buoyed by the wave of negative publicity –banded together and filed a class action in federal court in New Orleans, Louisiana, seeking to represent a nationwide class seeking recovery for the so-called injury of addiction. The case was initially certified, but the Fifth Circuit reversed and decertified the class.[7] The plaintiffs' group responded by abandoning the idea of a nationwide class, and filed in its place a series of state class actions, trying to certify classes of injured smokers in each state. The bulk of these actions were rejected by the courts, which found that the same individual issues and state law variations that barred a nationwide class also barred each state class.

Separate from the efforts of this plaintiff lawyer consortium, a small Florida firm filed a flight attendant ETS class action in Miami that was settled, and also filed a nationwide class action on behalf of injured smokers, that was cut back to a Florida class.[8] In addition to these class actions, individual smokers have continued to file lawsuits.

Beyond the class action front, the plaintiffs' bar pursued the so-called "attorney general cases." The basic theory of these cases was to pair a state attorney general with one or more plaintiffs' firms, glued together with a contingent fee arrangement, and file a suit claiming that the state had spent billions on the health care costs of the smoking poor, and the tobacco companies should repay them. These claims were in the nature of subrogation claims, but the attorneys general sought to prove their claims without having to adduce proof from the individual smokers themselves. Eventually, an attorney general suit was brought or threatened in every state of the union. As in the class actions, the plaintiffs clamored for the companies to be punished for allegedly marketing to underage smokers who were said to be defenseless; for "manipulating nicotine"; for selling a dangerous product (even though Congress affirmatively makes it legal to do so); and for using attractive advertising. The companies eventually resolved the enormous claims being asserted in this litigation with a multi-billion dollar Master Settlement Agreement, which provides for payments to the states for 25 years and beyond, restricts advertising, and imposes other burdens as well. The private lawyers who banded together with the attorneys general received billions in fees, and the anti-tobacco advocates declared that their tactics had been successful. Meanwhile, however, the tobacco companies continue to prevail in numerous cases tried around the country, and although there have been some plaintiffs' verdicts, only one such verdict was upheld thus far through the completion of all appeals.

**QSR Lawsuits**

**Attempt to Build Anti-QSR Public Sentiment:**

As can be seen, tobacco litigation was often promoted by consumer advocates who sought and obtained

publicity aimed at increasing the public sentiment against smoking and encouraging programs and policies that ostracized and isolated the ever-shrinking minority of smokers. In a similar manner, some of those same advocates, like Professor John D. Banzhaf, III, have begun testing the waters of food industry litigation by filing several lawsuits, authoring articles aimed at inciting public outrage against the food industry, and appearing on talk shows and news programs such as CNN's "Crossfire." Banzhaf began by filing a class action against McDonald's Corporation, alleging that McDonald's misrepresented that its fries were acceptable for vegetarian diets. The parties settled this case for millions of dollars. Next, Banzhaf brought a lawsuit against Pirates Booty, a popular snack food, for mislabeling fat content. Banzhaf continued his crusade against the food industry by filing suit against Pizza Hut for mislabeling the content of "Veggie Lovers Pizza." The efforts of Prof. Banzhaf and others like him, such as Northeastern University Law School Professor Richard Daynard, have generated media attention on the nation's obesity problem and have attempted to point their collective fingers at the food industry as the new villain.

Like the early reports published by the American Cancer Society and the U.S. Surgeon General, health organizations are beginning to speak out against obesity as a health concern. For example, the Surgeon General's 2001 report entitled "Call to Action to Prevent and Decrease Overweight and Obesity" states that "[m]orbidity from obesity may be as great as from poverty, smoking, or problem drinking. Overweight and obesity are associated with an increased risk for coronary heart disease; type 2 diabetes; endometrial, colon, postmenopausal breast, and other cancers; and certain musculoskeletal disorders, such as knee osteoarthritis."[9]

Politicians and government agencies are beginning to speak and act against obesity. In 2002, Senator Bill Frist introduced INPACT, the Improved Nutrition and Physical Activity Act, aimed at combating the nation's obesity problem. On a smaller scale, the Los Angeles School District officially banned the sale of sodas. And in Maine, the State Department of Health asked families to cut back on their use of soft drinks citing a concern for nutrition. In short, there is an undeniable movement to spread alarm about the potential health risks associated with obesity and, as with tobacco, there is a move afoot by plaintiffs' lawyers to find a deep pocket that might be the next source of contingent fees.

**Anti-Food Industry Lawsuits:**

The plaintiffs' bar tested the waters with two lawsuits against QSR in mid-summer 2002. It was clear that these plaintiffs modeled their claims after the tobacco claims and immediately tried to rouse public sentiment in their favor. These lawsuits, however, were met with an onslaught of negative commentary from every part of the country and across the Atlantic.[10]

One of the class action lawsuits was filed on July 24, 2002 in the Eastern District of New York and named four well-known QSRs — McDonald's Corporation, Burger King Corporation, KFC Corporation, and Wendy's International. The plaintiff class was described as "individuals and consumers who have purchased and consumed the defendants' products and as a result thereof, have become obese, overweight, developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects and/or diseases." The plaintiff asserted claims of negligence, fraud and product liability. The other test lawsuit was filed on July 12, 2002, against the same four defendants in the Supreme Court of the State of New York, Bronx County, on behalf of the same class of plaintiffs, and asserted the same causes of action. Apparently taken aback by the ridicule they suffered in the media, plaintiffs publicly announced they were withdrawing the lawsuits even before any of the defendants were served with the complaints.[11]

Similar to what transpired in the tobacco litigations, the plaintiffs' lawyers in the QSR lawsuits are refining their causes of action in an attempt to make them more likely to withstand a motion to dismiss for failure to state a claim and to make them more palatable to jurors. After the first two lawsuits met immediate ridicule both in the legal community and in the media, plaintiffs' counsel, with input from consumer advocates with tobacco industry litigation experience, refined the complaint and filed *Pelman v. McDonald's* on August 22, 2002 in the Supreme Court of the State of New York, Bronx County. The lawsuit was later removed to the Federal District court for the Southern District of New York. The purported class is similar to the class alleged in the first two class actions[12] but adds a new category of class members consisting of children –alleged to be innocent victims without the ability to select their own diets and unable to resist the draw of advertising techniques. Unlike the previous complaints, however, this complaint was actually served on its defendants. In November 2002, the defendants in *Pelman* filed a motion to dismiss the complaint on the grounds that (1) there is no duty to warn about the ingredients and characteristics of ordinary food; (2) that plaintiff cannot as a matter of law establish that it was the defendants' products that caused the alleged injuries; (3) that the public cannot be deceived about the characteristics of products that are commonly known and understood; and (4) that public policy disfavors the expansion of the outer boundaries of tort liability. The United States District Court for the Southern District of New York ruled on the motion on January 22, 2003, dismissing the complaint on procedural grounds.

**Flawed Logic: What is wrong with the food industry lawsuits?**

Contrary to the anti-tobacco hype and as explained above, tobacco litigation tactics have not been successful, even in tobacco litigation — unless, of course, one considers the vast transfer of wealth to a relatively small number of lawyers a success. But, the process of whipping up negative publicity and attempting to both demonize the product and portray users as uninformed sheep in the hopes of a favorable litigation outcome has even less of a chance of success with food products.

*Legal Differences*

Obesity plaintiffs will face extreme difficulty in attributing their obesity to the fast food of a QSR. In cigarette cases involving lung cancer, there is a well-developed body of statistical evidence that associates lung cancer with smoking. A number of tobacco companies have established websites pointing out that smoking cigarettes can cause disease. While each tobacco plaintiff must prove that his or her specific condition was caused by smoking, there is an established body of evidence that assists the plaintiff in making that claim in a cigarette case. By contrast, causation –even general causation – should be exceedingly difficult to establish in a case filed against a QSR.

It would be extremely difficult, if not actually impossible, for a plaintiff to prove that his or her health problems were caused by eating a product manufactured, distributed or sold by a QSR. Quite simply, there are far too many other factors contributing to weight gain including genetics, lack of physical activity and every other type of food ingested by the plaintiff that was not from the defendant's restaurant. Even after plaintiffs hurdle the phase of general causation – it is possible that one food made me fat – they will be faced with proving that being fat was the cause of a specific health malady. The food defendants will have no problem identifying overweight people who are healthy as professional athletes or skinny people who suffer the exact same affliction as the plaintiffs.

The product liability allegations are equally flawed. Since 1966, cigarettes have been labeled as dangerous. This is not the case for fast foods. Assuming that plaintiffs could somehow portray "fast food" as a dangerous product for which its manufacturer should have warned the public of the potential harm, the plaintiffs would face a second hurdle in showing that a warning would have made a difference in a consumer's food choice and also that the different food choice would have made an impact on their health.[13] A showing of this chain of causation seems highly doubtful. Likewise, allegations that QSRs failed to label the nutritional content of their products is inaccurate since many of the QSRs restaurants, including the QSRs already named as defendants, voluntarily post the nutritional content of their products and have done so on a voluntary basis since the early 1990s when Congress passed the Food Labeling Act.[14] The information is also available on the internet web sites of each of the name defendant QSRs. Indeed, although not covered by the Food Labeling Act, the QSRs typically post more in formation and more detailed information than that which the government requires of food manufacturers that are covered by the Act.

The applicability of theories of product liability to food products has been addressed by the legal community in the Restatement of Torts.[15] Section 402A of the Restatement states that one will be liable for "any product [sold] in a defective condition unreasonably dangerous to the user or consumer." The comments to this section of the Restatement shed further light on the inapplicability of product liability claims against the QSRs. First, comment i states that "[m]any products cannot be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption."[16] Likewise, comment j explains that "a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally recognized." The Restatement identifies liability only when a product is either defective in design or is defective because of inadequate instructions or warnings,[17] but comments that the test for a design defect is "whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so whether the omission of the alternative design by the seller…rendered the product not reasonably safe."[18] In sum, the applicability of a product liability claim against the food industry has already been addressed and dismissed.

The food industry plaintiffs also rely on claims of fraud and deceit as state law causes of action. In particular, plaintiffs claim violation of the New York Consumer Fraud Statute,[19] which prohibits deceptive acts or practices in the conduct of any business, trade or commerce as well as false advertising.[20] The law, however, applies to the *reasonable* consumer and raises the immediate threshold question: did the defendants mislead the reasonable consumer? The public ridicule that immediately resulted from the filing of the QSR lawsuits was almost unanimous in the position that these lawsuits were without a basis and shows that the reasonable consumer was not misled. The food companies should not, however, assume those good feelings will continue. Early suits against tobacco companies were also ridiculed. To avoid the erosion of popular support, food companies must not allow the zealots to feed "junk science" to the media unanswered.

The food industry should also be able to ward off class actions. The food industry is extremely fragmented. Even if plaintiffs try to focus on one segment of that industry, QSRs, each defendant sells a multitude of different products. The availability of "warnings" at the different QSRs should also prevent class certification of these issues. Questions of what a consumer knew and when he knew it will predominate over individual issues leading to denial of class certification and greatly reduce the precedential value of a finding in an individual suit. Thus, even in the most class-action-favorable venues in America, it is extremely unlikely that a substantial case could be certified.

*Product Differences*

Another fatal problem with the claims brought against QSRs is that as a product, food is vastly different from tobacco and as an activity, eating is vastly different from smoking. Every single ingredient used in a food product sold at a typical QSR has been found to be Generally Recognized as Safe ("GRAS") by the federal government. Even in its recent broadside on the dangers of obesity, the Office of the Surgeon General was quick to point out that individual foods are not, in and of themselves, bad.[21]

If there is an analogy to be drawn here at all, perhaps it can be said that food is more like alcohol. Food is a product that can be consumed without harm to oneself or to others. Like alcohol, problems with food products arise only when an individual abuses the use of the product through over consumption. The Restatement of Torts, which provides that "good tobacco" is not defective just because it is dangerous, also provides that "[g]ood whiskey is not unreasonably dangerous merely because it will make some people drunk."[22] Similarly, QSR products are not unreasonably dangerous merely because it will make some people who abuse it gain weight.

Whereas smokers have been a minority of the total population for decades, the same cannot be said of consumers of fast food products. Unlike tobacco, there is no minority user that government might seek to unfairly oppress. Because smoking currently only affects a minority, it has been easier to pass legislation that prohibits smoking in public places, regulates advertising, and to levy confiscatory taxes on the product through attorney general suits and punitive verdicts. In contrast, it would be a near-impossible task to find a person who has not eaten some form of fast food. It is a product consumed and enjoyed by the vast majority of consumers who are not likely to sit back and suffer through its regulation, indirect taxation or prohibition.

*Practical Difference*

Juries frequently hold tobacco plaintiffs accountable for their decision to smoke. With regard to QSR plaintiffs, it is likely that the freedom of choice defense they will face will require an examination of all the food choices that the plaintiffs have made and an examination of the exercise choices that they have made, or more likely not made, over their lifetimes. It is likely that jurors will hold plaintiffs accountable for their dietary selections and sedentary lifestyles.

To avoid personal responsibility, contributory negligence and assumption of the risk, some tobacco plaintiffs claimed that they became addicted to cigarettes in their teens and supposedly could not quit thereafter. In sharp distinction, however, plaintiffs in the QSR litigation do not appear to contend that there is some substance in fast food that forces them to consume it against their will.

Finally, it is likely that QSR plaintiffs will try to portray the plaintiffs as helpless children. Magazine covers with children displaying a balloonish girth have already appeared. It is not by accident that the plaintiffs in the third QSR lawsuit are children as opposed to the plaintiffs in the first two lawsuits who were middle-aged adults. Children are believed to have a lower threshold of resistance to advertising and in all likelihood were taken to the QSR by an adult, perhaps a parent. Banzhaf has already boasted that traditional defenses like contributory negligence or assumption of the risk do not apply to children.[23]

On a very practical level, jurors will know the plaintiff toddlers did not buckle themselves in car seats and drive themselves to the drive through window. They were taken there by their parents – the very parents who did not exert enough control to prevent their children from gorging themselves and now want to share in a multi-million dollar claim. Jurors will not absolve the parent of their responsibility for the dietary choices they made for their children.

**Conclusion**

On January 22, 2003, the United States District Court for the Southern District of New York dismissed the complaint filed in *Pelman v. McDonalds*. It is doubtful, however, that this will be the last of the food industry lawsuits. Indeed, if the attorneys and advisors are serious in their devotion to their tobacco litigation tactics, then it is safe to say that this is just the beginning of litigation against the food industry and that plaintiffs' attorneys and advisors will continue to try to build public sentiment in their favor and will refine and polish their claims. Ultimately, it will be widespread knowledge of the nature of fast foods and common sense that will bring the fast food litigation to its knees.

* Mr. Davis, Ms. Driscoll, and Ms. Schwartz are in the New York office of King & Spalding and currently represent Wendy's International, Inc., in the class action litigation described herein. Mr. Davis is a member of the Federalist Society.

**Footnotes**

[1] *After Tobacco Suits, Lawyers Target Fast Food*, *at* http://www.cnn.com (Aug. 19, 2002).

[2] Public Health Service, U.S. Department of Health Education & Welfare, Pub. No. 1103, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964).

[3] The 1970 Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334 (1970).

[4] 502 U.S. 504 (1992).

[5] American Lung Assoc. Best Practices and Program Services Epidemiology and Statistics Unit, *Trends in Tobacco Use*, Table 4 (2002), *available at* www.lungsusa.com.

[6] *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, 1993. The validity of this report has been the subject of litigation. *See e.g.*, *Flue-Cured Tobacco Co-op Stabilization Corp. v. United States EPA*, 4 F. Supp.2d 435 (N.D.N.C. 1998), *vacated*, 2002 WL 31759899 (4th Cir. 2002).

[7] Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[8] *Engle v. RJ Reynolds Tobacco*, No. 94-8273. In *Engle*, a jury has entered a $145 billion punitive damage award in favor of a Florida class, even though all class members have yet to try their individual claim, with the exception of three individual class members. The *Engle* verdicts are now on appeal.

[9] U.S. Dep't of Health and Human Services, *The Surgeon General's Report*, *Call to Action to Prevent and Decrease Overweight and Obesity*, (2002).

[10] Mike Thomas, *Imagination Is All You Need to Feed from Litigation Trough*, Chicago Sun Times, Jul. 31, 2002; Cosmo Macero, Jr., *Caesar Barber Is Bringing the Business of Obesity Full Circle*, Boston Herald, August 2, 2002; *Oh, Temptation- Fast Food Lawsuits*, The Economist, Aug. 3, 2002; Tom McEnaney, *Alltracel Fights the Flab*, Sunday Times (London), August 4, 2002; Peg Tyre, Sally Abrahms & Jennifer Lin, *Fighting 'Big Fat'; An Army Is Mobilizing in A War Against Junk Food. The Combatants: Doctors, Lawyers, Preachers And Moms*, Newsweek, Aug. 5, 2002; Amanda Ursell, *On Nutrition Feel Full on Fewer Calories: Pick the Right Foods*, Los Angeles Times, Aug. 5, 2002.

[11] The first of the two class actions mentioned was voluntarily withdrawn on August 2, 2002. The second class action mentioned was not

withdrawn, but the lawsuit died after plaintiffs failed to serve it within 120 days of filing. N.Y. C.P.L.R. § 306-b (McKinney 2002).

[12] "New York state residents, infant-individuals, and consumers who have purchased and consumed the Defendant's products and as a result thereof, have become obese, developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or detrimental and adverse health effects and/or diseases, as a result of their respective conduct and business practices as mentioned hereinafter."

[13] The Ninth Circuit recently appeared to recognize the parallels between a smoker's claims that he was ignorant of the well-known dangers of tobacco and the claims of burger eaters who claim they were unaware what might happen if they consumed too many. *See Soliman v. Philip Morris, Inc*., 311 F.3d 966, 970 n.6 (9th Cir. 2002).

[14] 21 U.S.C. § 343 (2002).

[15] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[16] *Id*. at cmt. i.

[17] *Id*. at 402A.

[18] *Id*. at cmt. d.

[19] N.Y. GEN. BUS. LAW § 349-50 (McKinney 2002).

[20] *Id*.

[21] *The Surgeon General's Report*, *supra* note 9.

[22] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[23] *Crossfire* (CNN television broadcast, Sept. 2, 2002).